IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	*	
v.	*	**Criminal No. GJH-16-0434**
KEVIN HEITING	*	

*   *   *   *   *   *   *   *   *   *   *   *   *

MOTION TO SUPPRESS EVIDENCE SEIZED PURSUANT TO SEARCH WARRANT AND DERIVATIVE EVIDENCE

Mr. Kevin Heiting, through undersigned counsel, pursuant to Federal Rule of Criminal Procedure 12(b)(3) hereby moves this Honorable Court to suppress any evidence seized in violation of the Fourth Amendment to the United States Constitution. In support whereof, Mr. Heiting states the following:

1. Mr. Heiting is charged with Possession of Child Pornography, 18 U.S.C. § 2252A(a)(5)(B) and (b)(2). Indictment (ECF 20).

2. On information and belief, the government will seek to introduce at trial evidence allegedly seized pursuant to a May 16, 2016 search warrant issued by this Court. The warrant was executed on May 19, 2016 through the search of Mr. Heiting's residence on Chesterwood Drive in Silver Spring, and subsequently on unknown dates through the imaging and forensic examination of electronic devices allegedly seized during that search. These devices include without limitation the 2TB Seagate external hard drive with serial number 2GHNFYC2 referenced in the Affidavit in Support of Criminal Complaint (ECF 2) at 14.

3. It is herein alleged that agents effected entry to Mr. Heiting's residence outside the 6:00 AM – 10:00 PM timeframe permitted by the warrant. As such the search was unreasonable

and in violation of the Fourth Amendment. *Yanez-Marquez v. Lynch*, 789 F.3d 434, 467-68 (4th Cir. 2015) (holding that "the nighttime execution of a daytime warrant violates the Fourth Amendment, absent consent or exigent circumstances," and rejecting the additional requirements of prejudice or proof of intentional violation applied in some circuits.)

4. It is herein alleged that the affidavit provided in support of the application for the warrant failed to establish probable cause to permit the search and/or seizure authorized. As such, the warrant should not have issued. The Fourth Amendment requires that no search warrant shall issue without probable cause. Probable cause means a "fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). In evaluating the propriety of the warrant issued, this Court must determine whether there is substantial evidence in the record to support the magistrate's decision to issue the warrant. *Massachusetts v. Upton*, 466 U.S. 727, 728 (1984). While this Court should pay "great deference" to findings of probable cause, it does not mean that warrants should be upheld when based on objectively unreasonable grounds for believing the warrant is valid. *Gates*, 462 U.S. at 236.

5. The "good faith" exception to the exclusionary rule noted in *United States v. Leon,* 468 U.S. 897 (1984), does not apply to this search and seizure because the activity of law enforcement in this case was objectively unreasonable. The "good faith" exception does not apply in this case for one or more of the following reasons: 1) the Search Warrant was issued in reliance on misleading omissions in the application; 2) the magistrate acted as a "rubber stamp" in approving the search warrant, rather than in "neutral and detached" fashion; 3) the application was legally insufficient for a determination of probable cause; and/or 4) the application was "so lacking

in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Id.* at 914-923 (citations omitted). In essence, *Leon*'s "good faith" exception is not applicable because "this is not a case of 'objectively reasonable law enforcement activity.'" *United States v. Wilhelm*, 80 F.3d 116, 123 (4th Cir. 1996).

6. Any additional searches and seizures, whether pursuant to warrants or warrantless, were also unreasonable and in violation of the Fourth Amendment.

7. All fruits of these unreasonable searches, including without limitation statements and tangible evidence, should be suppressed pursuant to *Wong Sun v. United States,* 371 U.S. 471 (1963).

8. Because both discovery and investigation of this case are ongoing, the defense reserves the right to supplement this motion, as well as to move for suppression of evidence based on grounds not now discernible such as, but not limited to, rights under *Franks v. Delaware*, 438 U.S. 154 (1978).

WHEREFORE, the Defendant requests that this Court grant an Order of Suppression on the grounds alleged herein, in any supplemental memoranda, and any other grounds that may become apparent upon a hearing on the motion.

Respectfully submitted,

JAMES WYDA
Federal Public Defender

/s/

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REQUEST FOR HEARING

Pursuant to Rule 105.6 of the Local Rules of the United States District of Maryland, a hearing is requested on the defendant's Motion.

/s/
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Assistant Federal Public Defender